IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.1150 OF 2005

IN

EXECUTION APPLICATION NO.352 OF 2002

IN

SUMMARY SUIT NO.345 OF 1999

M/s.Wolstenholme International Ltd. ...Plaintiff

Versus

Twin Stars Industrial Corporation

& Ors. ...Defendants

And

The Sheriff of Bombay & Anr. ...Respondents

ALONG WITH

CHAMBER SUMMONS NO.1151 OF 2005

IN

EXECUTION APPLICATION NO.351 OF 2002

IN

SUMMARY SUIT NO.346 OF 1999

M/s.Wolstenholme International Ltd. ...Plaintiff

Versus

Universal Trunk Depot & Ors. ...Defendants

And

The Sheriff of Bombay & Anr. ...Respondents

Mr.Zal Andhyarujina with Mr.R.A.E.Saini i/b M/s.Maneksha & Sethna for Applicant/Defendant No.4.

Ms.Deepa Chavan i/b Little & Co. for Plaintiff.

Mr.B.Shroff with Mr.Ashok Varma i/b Gagrat & Co. for Defendant No.2.

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CORAM: A.M.KHANWILKAR, J.

SEPTEMBER 6, 2005.

P.C.

1. Heard Counsel for the parties.

2. These Chamber Summonses are taken out by Defendant No.4 to facilitate compliance of direction given in order dated 23rd August 2005 in Chamber Summonses Nos.644 of 2005 and 645 2005. Under that order, the Defendant no.4 is required to deposit sum of Rs.2,19,54,038.00 (Rupees Two Crores Nineteen Lakhs Fifty-four Thousand & Thirty-eight) on or before 8th September 2005. To enable the Defendant No.4 to fulfil that obligation, the Defendant No.4 intends to mortgage Flat No.203 and

Flat No.232 on the 20th floor, Jolly Maker, Apartment No.1 Tower "B", Cuffe Parade, Mumbai - 400 005, so as to raise funds from ICICI Bank to satisfy the decree passed against the Defendants, under which, the Defendants are "jointly and severally" liable to pay specified amount.

3. The predicament of Defendant No.4 as is pointed out before this Court is that both the flats being Flat Nos.203 and 232 are of joint ownership of Defendant No.4 and Defendant No.2. In such a case, the bankers insist that both the owners should be party to the mortgage document. Defendant No.2, on the other hand, is not coming forward to execute the relevant documents. It is seen from the record that the contribution made by the Defendant No.2 so far, is very marginal; whereas, the obligation under the decree of all the Defendants is quite substantial. The Defendant No.4 has already agreed before this Court to satisfy the decree in the first place and thereafter to proceed against other Defendants for contribution in accordance with law. As mentioned earlier, to enable the Defendant No.4 to raise

funds to satisfy the decree, the Defendant No.4 has approached his bankers, who, in turn, have insisted for execution of Mortgage Deed jointly by Defendant No.2 and Defendant No.4, as they are the joint owners of the respective flats. Flat No.203 is in occupation of Defendant No.2, whereas, Flat No.232 is occupied by Defendant No.4. In this backdrop, present Chamber Summonses have been filed.

4. These Chamber Summonses are, however, resisted by Defendant No.2. In the first place, it is contended that the Chamber Summonses are not maintainable, as the same are not covered by any of the clauses of Rule 121 in Chapter IX of High Court (Original Side) Rules. It is next contended that the obligation of Defendant No.2 to contribute would arise only after the Defendant No.4 has made all payments to satisfy the decree and then call upon the Defendant No.2 to contribute. This submission is advanced, relying on Section 43 of the Contract Act. Reliance is also placed on the decision of Rajasthan High Court reported in **AIR 1957 Raj. 267 in the case of Shankerlal vs. Motilal & Anr.** It is then contended that the

Defendant No.4 cannot proceed to mortgage the two flats unless prior permission in writing of the Society is obtained under model Bye-law No.45. Lastly, it is contended that the Defendant No.2 cannot be compelled to mortgage his right, title, interest in respect of the subject flats. This submission is made relying on provisions of Section 44 of the Transfer of Property Act.

5. So far as the first objection taken on behalf of Defendant no.2 is concerned, in my opinion, the Defendant No.4 has rightly countered the same, relying on Sub-Rules 15 and 16 of Rule 121. Sub-Rule 15 provides for all applications in execution, whereas, Sub-Rule 16 provides for all applications under Section 47 of the Code of Civil Procedure to be disposed of by Judge in Chambers. Section 47 of the Code of Civil Procedure is very widely worded. It will cover the nature of relief claimed in the present Chamber Summonses and as mentioned earlier, said Applications will have to be disposed of by the Judge in Chambers by virtue of Rule 121 of the High Court (Original Side) Rules. Counsel for the Defendant No.4 has rightly

relied on clause (b) of sub-section (3) of Section 47 of the Code of Civil Procedure, which provides that all questions relating to the delivery of possession of property, which is put in execution, to such purchaser or his representative, shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this Section. In my opinion, therefore, there is no substance in the preliminary objection raised on behalf of Defendant No.2 about the maintainability of the Chamber Summonses.

6. Insofar as the objection taken by Defendant No.2 relying on Section 43 of the Contract Act and the decision of the Rajasthan High Court in **Shankerlal's decision (supra)**, in my opinion, there is no substance even in this objection. Counsel for the Defendant No.4 has, in my opinion, rightly contended that the question of claim of contribution by Defendant No.4 does not arise at this stage, for, as at present, the Defendant No.4 only intends to raise funds by mortgaging the properties in question. In such a situation, Section 43 or for that matter, the

exposition in the decision in **Shankerlal's case (supra)**, will be of no avail.

7. As mentioned earlier, the limited prayer in the present Applications taken out by Defendant No.4 with a view to satisfy the decree passed against the Defendants, is to direct the Prothonotary and Senior Master, High Court, Bombay, to forthwith sign the necessary mortgage documents in respect of the subject flats on behalf of Defendant No.2 who has joint interest in the said flats along with the Defendant No.4, but has declined to execute those documents. Accordingly, there is no merit even in this objection taken by Defendant No.2.

8. Insofar as the latter two objections taken by Defendant No.2 that in absence of compliance of Bye-law 45 of obtaining prior permission of the Society or for the direction, would be contrary to the purport of Section 44 of the Transfer of Property Act, so as to compel the Defendant No.2 to execute mortgage deed is also without any merit. I find substance in the argument canvassed on behalf

of Defendant No.4 that both these flats are presently attached under the orders of this Court.

9. As the flats in question are attached, it will be open to this Court to issue directions to the parties and in particular, as is sought in the present Chamber Summonses so as to facilitate satisfaction of the decree, which is put in execution. Insofar as requirement of seeking prior permission from the Society to mortgage the flats is concerned, such permission can be obtained before the mortgage document is actually executed by the Defendant No.4 and Prothonotary and Senior Master, High Court, Bombay on behalf of Defendant No.2 by virtue of this order. I also find substance in the argument of Defendant No.4 that Section 51 of Code of Civil Procedure is wide enough to enable the Court to pass directions in terms of the relief claimed in the present Chamber Summonses. In my opinion, therefore, there is no inhibition in issuing directions as prayed in the present Chamber Summonses.

10. The question is: whether relief in terms

of prayer clause (a) or prayer clause (b) ought to be granted. Indeed, Defendant No.4 has joint share in respect of both the flats. However, as has been mentioned earlier, the Defendant No.2 is not extending any cooperation to Defendant No.4 for satisfying the decree in question. The Defendant No.4 is not asking for contribution from Defendant No.2 at this stage, but is only wanting mortgage of the flats, to raise funds from the bankers to satisfy the decree. The Defendant No.4 has already made substantial contribution towards part satisfaction of the decree. Even the balance amount is being contributed by the Defendant No.4 in terms of order passed on 23rd August 2005. Even if flat occupied by Defendant No.2 is to be mortgaged, the primary responsibility of paying the mortgage amount will be that of the Defendant No.4.

11. During the course of hearing, it was suggested by the Counsel for the Defendant No.2 that it is unnecessary to mortgage the flats in question. Instead, the family property at Panvel can be disposed of and there is pending offer for that property for around Rs.2.2 crores. In the

first place, this statement is made only across the bar for the first time. Besides, I see no propriety in this suggestion because as is rightly argued by the Defendant No.4, there are interse disputes and pending litigation between the parties in regard to Panvel property. Besides, the said property is already encumbered to the extent of over Rs.75,00,000/- (Rupees Seventy-five Lakhs). If it is so, the sale proceeds from the said property after providing for deduction towards such encumbrance, will be insufficient to satisfy the obligation under the subject consent decree.

12. Taking overall view of the matter, in my opinion, in the interest of justice, it will be appropriate to allow the Chamber Summonses in terms of prayer clauses (a) and (d). Prayer clause (d) is a consequential direction to facilitate valuation of the property which will be the basis to extend commensurate financial facility against the said property. It is stated that for the present, mortgage of even one flat out of the two would be sufficient to raise the requisite amount to satisfy the decree.

13. Accordingly, Chamber Summonses are made absolute in terms of prayer clauses (a) and (d).

14. At this stage, Counsel for the Defendant No.2 prays that operation of this order be stayed for a period of two weeks. Counsel for the Defendant No.4 has, however, opposed this request on the argument that every day's delay will contribute to liability of further interest. Besides, it will expose the Defendant No.4, who is wanting to satisfy the decree, with further consequential action to be taken by the Judgement Creditor. Even Counsel for the Judgment Creditor has opposed request for stay of operation of this order. Accordingly, prayer for stay is rejected.

A.M.KHANWILKAR, J.